STATE OF MICHIGAN

COURT OF APPEALS

DEBORAH A. WILKE,

Plaintiff-Appellant,

v

ACCIDENT FUND INSURANCE COMPANY OF AMERICA,

Defendant-Appellee

and

BOJI GROUP,

Defendant.

UNPUBLISHED
January 25, 2007

No. 270744
Ingham Circuit Court
LC No. 05-000534-NO

Before: Murray, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's May 17, 2006, order granting Accident Fund Insurance Company of America's (AFICA's) motion for summary disposition in this premises liability case. We affirm.

I. Facts and Procedural History

The material facts of this case are not in dispute. On June 10, 2003, plaintiff, who had just left a job interview, was walking down a sidewalk on her way to a party store to get a loaf of bread. Plaintiff looked up after she heard somebody call her name, and moments later tripped and fell. After plaintiff fell, she noticed that she had tripped over a two inch raised portion of sidewalk located in the area of 418 South Washington in Lansing.

After the incident, plaintiff informed the city of Lansing about the condition of the sidewalk and was informed that AFICA owned the property. Richard Zapala (Zapala), who is assistant general counsel for AFICA, admitted that AFICA owned the parking lot adjacent to 414, 416 and 418 South Washington, which it leased to Boji Group (Boji). However, Zapala contended that the city of Lansing owned the sidewalk adjacent to AFICA's property and never ordered AFICA to make repairs to the sidewalk. Approximately two weeks after plaintiff's accident, the city of Lansing repaired the sidewalk, but never assessed repair costs to AFICA.

On April 26, 2005, plaintiff filed suit against AFICA and Boji[1] seeking reimbursement for her damages that were a result of defendants' failure to properly maintain and repair the sidewalk or warn individuals regarding the dangerous condition of the sidewalk. On February 1, 2006, AFICA filed a motion for summary disposition pursuant to MCR 2.116(C)(10) on the alternative grounds that it did not own or possess the sidewalk, and that even if it did, the raised portion of the sidewalk was an open and obvious danger, and thus AFICA had no duty to maintain and repair the sidewalk or warn individuals about the raised portion of the sidewalk.

On February 22, 2006, after hearing oral arguments from the parties, the trial judge stated, "unless the Plaintiff comes forward with some factual proof or support that [AFICA] owns that sidewalk, I don't believe there is any support that [AFICA] owns the sidewalk and that they're required to maintain it, as far as construction and repairs." The trial judge ruled that she would give plaintiff 14 days to provide evidence that established that [AFICA] owned the sidewalk or that the city of Lansing passed an ordinance or resolution requiring adjacent property owners to maintain and repair sidewalks adjacent to their property. When the parties reconvened on May 3, 2006, plaintiff had not supplied any evidence that established that AFICA owned the sidewalk or that the city of Lansing had passed an ordinance or resolution requiring adjacent property owners to maintain and repair sidewalks. The trial court subsequently granted AFICA's motion for summary disposition, finding that AFICA did not have "control or possession of the sidewalk," and therefore, did not have a "duty to repair or maintain [the] sidewalk" and could not be liable for an injury that occurred on the sidewalk.

On appeal, plaintiff argues that there was a genuine issue of material fact regarding whether AFICA owned and had a duty to maintain and repair the sidewalk that she slipped and fell on, and thus, the trial court erred when it granted AFICA's motion. We disagree.

II. Standard of Review

We review a trial court's decision to grant or deny a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Review is limited to the evidence presented to the trial court at the time the motion was decided. *Peña v Ingham Co Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002).[2]

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[1] Plaintiff did not dispute the dismissal of Boji as a party to the lawsuit. Accordingly, on March 17, 2006, the trial court granted Boji's motion for summary disposition.

[2] We note that plaintiff has cited to several outdated cases, such as *Rizzo v Kretschmer*, 389 Mich 363; 207 NW2d 316 (1973) which no longer contain the proper standard to apply in deciding
(continued…)

III. Analysis

To establish a negligence claim, a plaintiff must establish: (1) a duty owed by the defendant to the plaintiff, (2) breach of that duty, (3) injury suffered by the plaintiff, and (4) causation of that injury by the defendant's breach. *Phillips v Diehm*, 213 Mich App 389, 397; 541 NW2d 566 (1995). Generally, a premises possessor has a legal duty to business invitees to exercise reasonable care to protect them from an unreasonable risk of harm caused by dangerous conditions on their land which the premises possessor knows or should know the invitees will not discover, realize or protect themselves against. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). Furthermore, a premises possessor has a duty to warn licensees of hidden dangers on their land that the possessor knows or has reason to know of, if the licensee does not know or have reason to know of the dangers. *Burnett v Bruner*, 247 Mich App 365, 378; 636 NW2d 773 (2001). However, a party that does not have possession and control over the land upon which an accident took place, cannot be held responsible for that accident under a premise liability theory. *Kubczak v Chemical Bank and Trust Co*, 456 Mich 653, 660-661; 575 NW2d 745 (1998).

In particular, it is generally the government's duty to maintain sidewalks. MCL 691.1401(e); MCL 691.1402(1); *Haaksma v City of Grand Rapids*, 247 Mich App 44, 57; 634 NW2d 390 (2001) (stating that a property owner did not have a duty to repair a sidewalk adjacent to its property). Furthermore, Lansing ordinances 1024.01 and 1024.03 state that an adjacent property owner cannot repair the damaged portion of an adjacent sidewalk unless the property owner is ordered to do so by the city council.

Here, plaintiff testified that she was walking down the sidewalk when she tripped and fell on a raised portion of the sidewalk. In responding to defendant's properly supported motion, plaintiff failed to present any evidence that defendant owned the sidewalk, was ordered to repair the sidewalk, or otherwise has possession or control of the sidewalk. Accordingly, AFICA did not have a duty to maintain or repair the sidewalk. MCL 691.1401(e); MCL 691.1402(1); Lansing Ordinances, § 1024.01 and 1024.03; *Haaksma, supra* at 57. The trial court did not, therefore, err when it granted AFICA's motion for summary disposition. *Kubczak, supra* at 660-661; *Diehm, supra* at 397.[3]

Affirmed.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens

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summary disposition motions under MCR 2.116(C)(10). See *Smith v Globe Life Ins. Co.*, 460 Mich 446, 455 n2; 597 NW2d 28 (1999).

[3] Alternatively, even if AFICA possessed or controlled the sidewalk, we would still affirm the trial court's order because plaintiff testified that she would have seen the raised portion of the sidewalk had she been looking forward as she was walking down the sidewalk, and there were no special aspects to the sidewalk. *Lugo v Ameritech Corp.*, 464 Mich 512, 517-520; 629 NW2d 384 (2001).